

# **In the Supreme Court of the United States**

OCTOBER TERM, 1898.

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THE UNITED STATES, appellant, v. J. FRANCISCO CHAVEZ et al.	}	No. 207. Antonio Gutierrez grant in New Mexico.
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THE UNITED STATES, appellant, v. J. FRANCISCO CHAVEZ et al.	}	No. 208. Joaquin Sedillo grant in New Mexico.
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## **APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.**

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### **BRIEF ON BEHALF OF THE UNITED STATES.**

On September 9, 1896, J. Francisco Chavez filed two petitions in the Court of Private Land Claims, one praying for the confirmation of the Antonio Chavez grant and the other the Joaquin Sedillo grant adjoining,

situated in Valencia County, N. Mex., alleging that the grants were complete and perfect at the date the United States acquired sovereignty over the Territory; these claims were thus brought under section 8 of the act establishing the Court of Private Land Claims, as claims for perfect grants, as those provided for in section 6 of the act were barred, section 12 requiring that they be filed before March 3, 1893.

Although these petitions involved different grants, the unity of ownership or claim of ownership for many years, the alleged enjoyment and possession for a number of years, irrespective of the common boundary line between the two, and other circumstances common alike to each induced the Court of Private Land Claims to try the cases together, and the opinions and decrees covered both causes.

The origin of the claimants' rights, if any, being under different grants to separate individuals, it is deemed proper in presenting them as one case to state them separately. The references to the record, except when otherwise stated, are to the record in case No. 207.

First, as to the Antonio Gutierrez grant in No. 207

The allegations of the petition in this case (R., 1, 2) were substantially as follows:

That on November 5, 1816, Capt. Antonio Gutierrez presented to Capt. Felix Martinez, the then governor and captain-general of New Mexico, his petition asking for a grant of a piece of land below Isleta, apparently at a distance of 2 leagues, which formerly had been held by Cristobal de Tapia, and setting forth that the boundaries of said land were, on the north an arroyo de alamos, which

comes down from the hills; on the south the pueblo of San Clemente; on the east the Rio del Norte, and on the west the hills of the Rio Puerco. On the same day the said governor, in the name of the King, made to the said petitioner the grant that he asked for, as he described it and as Cristobal de Tapia formerly enjoyed it, and directed Capt. Baltazar Romero to place the said petitioner in possession. It was alleged that the original of said petition and grant was known as archive No. 315 in the office of the surveyor-general for New Mexico, and copies thereof were filed with the petition.

That after the making of said grant the said Antonio Gutierrez entered into possession of said land, and he and his lawful successors in title from that time down to the present have had continuous and uninterrupted possession of the land embraced in said grant.

The claimant expressly averred that the eastern boundary of said grant, as set forth in his petition, refers to the old river bed of the Rio Grande del Norte, which at the northern portion of said grant was about 2 miles farther east than the present bed of said river, and that it was impossible to state even approximately the quantity of land embraced in said grant, as no survey thereof had ever been made; that the Arroyo del Alamos, mentioned as the north boundary, can not now be identified, probably owing to changes in the earth's surface which have denuded the arroyo, if it still exists, of all trees, and which may have entirely obliterated the arroyo itself; and that no tradition of its location has been preserved for the reason that this tract of land and the one immediately north of it, which had been the property of Joaquin

Sedillo, had become united in the ownership of a single person as early as the year 1734.

A sketch map was filed, showing the location of this grant with reference to the Joaquin Sedillo grant (R., opp. 35).

An abstract of title was filed by the claimant Chavez (R., 2,3), which set forth that the claimant was unable to present any direct conveyance from the original grantee or from his heirs with which he was in any way connected; that he relied upon the papers contained in archive No. 178 in the office of the surveyor-general for New Mexico to show that the original grantee, Antonio Gutierrez, took possession of said tract of land and afterwards transferred the same to Diego Padilla, who in turn conveyed the same to Nicolas de Chavez.

It is proper to state here that this assertion as to the deraignment of title is sustained only in part by the record. It is true that Diego Padilla succeeded to all the interest of Antonio Gutierrez at some time prior to January 7, 1734. This appears from deed of January 7, 1734, from Diego Padilla to Diego Borrego (R., 16), wherein the grantee, deeding land that was conveyed to him by Antonio Gutierrez, recites that he has the title papers of the whole tract. It is further apparent, however, from this deed, that there was conveyed by Padilla to Borrego, and thereupon by Borrego to Nicolas de Chavez, only a portion of the title acquired by Padilla from Antonio Gutierrez, for the south boundary of the lands deed by Padilla (R., 16), is recited to be the "land of the said Diego Padilla," thus showing that he

retained a portion for his own use. The status of this Antonio Gutierrez title in 1736, as shown by archive 178, is therefore that the northern portion of it was owned by Nicolas de Chavez and the remainder by Diego Padilla. It is further averred in claimants' abstract of title that at some time prior to the year 1785 the tract claimed had become the property of Clemente Gutierrez, this being shown by archive No. 371 in the office of the surveyor-general of New Mexico, said archive being a record of the proceedings as to the estate of said Clemente Gutierrez. There is no specific averment in the petition that Clemente Gutierrez succeeded to the title of Nicolas Duran de Chavez or to that of Diego Padilla, and there is a total failure of proof on this point. The record thus discloses a break of fifty years in the title to this tract, and when it is resumed in 1785, there is no claim that the land is held under the Antonio Gutierrez grant or under Duran de Chavez and Diego Padilla, the erstwhile owners of that grant, but (R., 20), the tract is described as "a ranch below the boundary of the Pueblo of Isleta \* \* \* of which they have *possession*, *although there is no title deed of its boundaries.*"

The allegations of the petition filed in the Joaquin Sedillo grant case, No. 208, were substantially as follows (R., case No. 208, pp. 1, 2):

That some time in the early part of the eighteenth century a grant of land was made by the proper authorities of the Government of Spain to one Joaquin Sedillo, which land lies immediately south of the lands of the Indian pueblo of Isleta, and was bounded on the north

by the line of the league of said pueblo, on the east by the Rio Grande, on the south by the twin alamo, called by some the alamo de la culebra, and on the west by the ceja of the Rio Puerco; but the original grant papers evidencing the said grant have been lost or destroyed and can not now be produced. The fact of the existence of the said grant is, however, shown by the papers which constitute a portion of archive 178 in the office of the surveyor-general for New Mexico (tendered on the trial).

That from the time of the making of said grant the said Joaquin Sedillo and his lawful successors in title have been in continuous, peaceable, and uninterrupted possession of the land embraced within the grant down to the present time. That the boundaries of said grant are as before set forth, but it is expressly averred that the eastern boundary refers to the old river bed of the Rio Grande, which is about 2 miles farther east than the present bed of that river. That it is impossible to state, even approximately, the quantity of land embraced in said grant, as no survey thereof has ever been made; that the southern boundary hereinbefore mentioned has, as petitioner is informed and believes, been completely destroyed and its location can not now be identified with certainty, and it is probable that no tradition of its location now exists, for the reason that the said tract of land and the one immediately south thereof (Antonio Gutierrez grant) had become united in ownership in the hands of one person as early as the year 1734, as will fully appear by reference to the said archive 178 thereinbefore mentioned.

The abstract of title in the Joaquin Sedillo Case (R., case No. 208, pp. 2, 3) states among other things:

The claimant is unable to present any direct conveyance from the original grantee or from his heirs, with which he is in any way connected, but he relies upon archive 178, in the office of the surveyor-general for New Mexico, to show that the heirs of Joaquin Sedillo, in the year 1734, sold and conveyed the said tract of land to Diego Borrego and that the latter, in the year 1736, conveyed the said land to Nicolas de Chavez.

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The claimant relies upon archive No. 371 in the office of the surveyor-general of New Mexico to show that at some time prior to the year 1785 the said land had become the property of Clemente Gutierrez. The said archive No. 371 is a record of the proceedings as to the estate of said Clemente Gutierrez \* \* \* [which] shows the inventory of all the real estate belonging to said Clemente Gutierrez and the *hijuela* given to each of the heirs showing their respective shares of said real estate.

Under these allegations in the abstract of title, which are sustained by the record, the ownership of the Joaquin Sedillo grant was vested in 1736 in Nicolas de Chavez. From 1736 to 1785, when there was an inventory of the estate of Clemente Gutierrez, there is a break in the title, and there is absolutely nothing to show that Clemente Gutierrez acquired this land under the Joaquin Sedillo grant or from Nicolas de Chavez, the vendee thereof, or in fact how he acquired it, save such inference as may be drawn from the language in the inventory of his estate (R., 20) above quoted, which indicates that he held a mere possessory title.

The abstract of title further sets forth several deeds upon which claimant relies to connect himself with the title of said Clemente Gutierrez.

On November 13, 1896, the Indians of the pueblo of Isleta filed petitions in both cases, alleging an interest in the grants, and praying to be allowed to come into these cases as copetitioners with J. Francisco Chavez, which petitions the court granted and allowed. (R., 5.)

The Indians did not set up the boundaries of the tract claimed by them, but simply allege an interest in the two grants, and pray that the validity of the grants sued for be considered.

The causes came on for trial on May 5, 1897, being heard together. Claimants' documentary evidence, so far as it was material to the Antonio Gutierrez grant case, consisted of archive 315, from the office of the surveyor-general (R., 11-13), which appears to be a petition to the governor by, and a grant to, Antonio Gutierrez of the tract referred to by that name; and two deeds, one dated January 7, 1734, by Diego Padilla to Diego Borrego of a portion of said lands acquired by Padilla from Antonio Gutierrez (R., 16), and another deed from Borrego to Nicolas de Chavez (R., 13), dated August 16, 1736, covering the same premises, both said deeds being portions of archive 178 in the office of the surveyor-general of New Mexico. The contents of the first of these deeds have been discussed above, it being a conveyance by Diego Padilla to Diego Borrego, dated January 7, 1734, of a piece of land which he (Padilla) "had and possesses by donation, which, in favor of said Padilla, was made by Capt. Antonio Gutierrez, and its boundaries are: On the

north, lands of Joaquin Sedillo; on the east, the Rio Grande; on the south, land of the said Diego Padilla, there serving as a landmark on the said boundary the midway line between the two houses which the said Padilla built near the boundary line on the said donation; and on the west, with the boundary line called for in the title papers of the whole tract which the said Padilla has." By this conveyance, as above shown, Borrego became the owner of a portion of the Antonio Gutierrez tract, the remainder being at that date the property of Diego Padilla.

The second of these deeds is a conveyance by Diego Borrego to Nicolas de Chavez, dated August 16, 1736, by which he conveys the tract mentioned in the deed last discussed and that mentioned in another deed, dated January 11, 1734, hereinafter discussed in connection with the Joaquin Sedillo grant. This deed of August 16, 1736, purports to convey "a tract of land for the pasturage of small stock, neat cattle, and horses, and also agricultural lands which he acquired by real sale from the heirs of Joaquin Sedillo; and he also said that he gave and did give, together with this real sale and annexed thereto, a donation which to the said Diego Basquez Borrego was made by Diego Padilla, in which appeared the free and general administration in order that he might make use according to his will of the said tract, the one and the other situate below Isleta, commonly called San Martin, and as it appears by his instruments their boundaries are, on the north lands of the pueblo of Isleta and on the west the Rio Puerco; on the south the house of the rancho of Diego Padilla, the said donation being

included in this conveyance, and on the east the Rio Grande," etc. With this deed of 1736 all mention of Antonio Gutierrez or of any grant to him ceases in the record.

The documentary evidence presented as bearing especially on the Joaquin Sedillo grant is comprised entirely in two deeds in archive 178. This consists (R., 18) of a deed dated January 11, 1734, executed by Antonio Sedillo, "legitimate son of Joaquin Sedillo and forced heir of the aforesaid," in which he conveys a tract of land "down the river and below the pueblo of Isleta, \* \* \* and gives and did give in real sale the said tract, after consultation and with the consent of his mother and his brothers and sisters, who gave him authority for the same, because the said Joaquin died in debt, and in order to procure the amount which he owed; and the said Antonio Sedillo acknowledges that the said tract was acquired by his said father *in part by grant in the name of His Majesty, and in part acquired and held under real sale, etc.*" This instrument is executed in favor of Diego Borrego and it is to be noted that the recitals therein are the only proofs in this record as to a grant to Joaquin Sedillo, or as to the nature, character, and extent of such a grant.

The second deed in archive 178 is dated August 16, 1736, and is one from Diego Borrego to Nicolas de Chavez by which he conveys the tract mentioned in the deed last discussed and in another deed dated January 7, 1734, discussed above in connection with the Antonio Gutierrez grant. The contents of this deed are fully

set forth above. With this deed of 1736 all mention of Joaquin Sedillo and of any grant to such a person ceases in the record.

The next document was tendered in evidence as germane to both claims and is archive 371 (R., 19-23), being an inventory of the estate of Clemente Gutierrez made in 1785. From this it appears that Clemente Gutierrez at the time of his death owned a portion of the land embraced within the grants claimed. As above pointed out, there is nothing in the archive or in the record at all to show how Clemente Gutierrez acquired this property. The only recital on this subject is the one above quoted, found in the inventory (R., 20), where the land is described as a tract "of which they have possession, although there is no title deed of its boundaries."

The remaining documentary evidence (R., 23-26) showed the purchase by one Francisco Xavier Chavez of certain interests, less than the entire fee, in the Bosque de los Pinos, a tract of land lying immediately south of the lands of the pueblo of Isleta and between the old and new beds of the Rio Grande, and being thus the east end of the lands covered by the two grants as claimed. This "Bosque de los Pinos" does not mean, as the court seems to have assumed in its opinion, a "grove of pines." The term "bosque" in New Mexico refers to a grove of a particular kind of trees, to wit, the poplar or cottonwood. The expression properly rendered is "the cottonwood grove of the Pinos."

The plaintiff, J. Francisco Chavez, was further shown to be the grandson of said Francisco Xavier Chavez and to claim said premises by inheritance.

There was also documentary evidence (R., 26, 27) showing that the Indians of Isleta had acquired interests in land west of the present bed of the Rio Grande and within the claimed limits of these two grants, by purchase from the heirs of Clemente Gutierrez, as early as 1808. There was no evidence on the trial, however, showing the extent or boundary westward of the lands so purchased by the Indians.

Testimony was also received (R., 7-10) showing that the ancestors of the plaintiff, Chavez, had for many years been in possession of the Bosque de los Pinos, claiming under the several purchases from the heirs of Clemente Gutierrez, and it was admitted by the Government that the Indians of Isleta had held possession of lands on the west side of the Rio Grande as far back as the memory of the oldest man living within the pueblo can extend, said possession being claimed under purchase from the heirs of Clemente Gutierrez (R., 10).

The only evidence, therefore, of a grant to Antonio Gutierrez is archive 315 (R., 11-13), being the petition by and grant to Antonio Gutierrez in 1716; and the attention of the court is directed to the absence of any act of juridical possession in this document. The only evidence of a grant to Joaquin Sedillo is a recital in a deed made by one of his heirs to Diego Borrego, the conveyance dated January 11, 1734, and heretofore referred to (R., 18, 19).

It is to be noted that neither of these instruments sets forth the boundaries satisfactorily, and there is no oral proof establishing their location; that the claimants candidly admit in their petitions that they are unable to

establish the location of the natural objects constituting respectively the south boundary call of the Sedillo grant and the north boundary call of the Gutierrez grant; that the Sedillo grant did not and could not extend from the Gutierrez grant to the lands of the Indians of Isleta, as claimed by plaintiffs, for the reason that the Sedillo tract (see deed of January 11, 1734, in archive 178, R., 18) was acquired "in part by grant in the name of his Majesty and in part acquired and held by real sale, as shown by five instruments which he delivers;" that in order to give effect to this recital and to make room for this land purchased by Sedillo his grant could not have occupied the whole of the land lying between the Gutierrez grant and the league of the Indians of Isleta; that there is absolutely no connection shown between Clemente Gutierrez and the original grantees, Sedillo and Gutierrez, or their vendees, Nicolas de Chavez and Diego Padilla, and that the claimant, in his abstracts of title above quoted, frankly admits his inability "to present any direct conveyance from the original grantee or from his heirs *with which he is in any way connected.*"

These facts being uncontroverted by the testimony, it was contended by the Government:

1. That there had been no sufficient proof of a grant either to Antonio Gutierrez or to Joaquin Sedillo.

2. That there was no sufficient proof of the boundaries of such grants, if there were grants.

3. That claimants not having connected themselves with the Spanish or Mexican Government by showing a derangement of title or a succession of interests from the grantee of such Government, the court had no jurisdic-

tion to confirm the claim, the right of the court to confirm grants being limited to titles "lawfully and regularly derived from the Government of Spain or Mexico," etc. (Sec. 13, act of 1891.)

4. That these titles were not complete and perfect at the date when the United States acquired sovereignty over the Territory of New Mexico, and as the petitions were filed subsequent to March 3, 1893, the court was without jurisdiction to confirm.

On May 25, 1897, the court, through Mr. Justice Sluss, handed down an opinion confirming the two grants as one tract of land, but confirming the portion of it known as the Bosque de los Pinos to claimant Chavez, and the land on the west side of the present river bed to the Indians of Isleta. (R., 37-40.) Mr. Justice Murray dissented, and in a well-written and learned opinion sustains the contentions of the Government. (R., 40-44.)

The United States prayed and was allowed an appeal on October 11, 1897 (R., 45), and the causes are now before this court for determination.

#### ARGUMENT.

The decision of the Court of Private Land Claims in this case should be reversed and the claim rejected for the following reasons:

1. There is no sufficient proof of a grant to either Antonio Gutierrez or to Joaquin Sedillo, or of a grant at all.

2. Even if there were a grant to one or both of these parties, claimants herein have not connected themselves therewith, so as to give the court jurisdiction of their claim.

3. Even if the proof be adjudged sufficient to establish a grant to one or both of these parties, the title conferred thereby was not complete and perfect at the date when the United States acquired sovereignty over the Territory of New Mexico; and the claims herein presented are therefore barred by the provisions of section 12 of the act of March 3, 1891.

4. A confirmation of the land lying east of the present bed of the Rio Grande to J. Francisco Chavez and of that lying west of the present bed of the Rio Grande to the Indians of Isleta is not justified by the record or by the provisions of the act establishing the Court of Private Land Claims.

#### I.

*There is no sufficient proof of a grant to either Antonio Gutierrez or to Joaquin Sedillo, or of a grant at all.*

#### A.

The only proof of a grant to Antonio Gutierrez is an incomplete paper found in the archives and bearing archive No. 315. From this document it appears that Antonio Gutierrez presented a petition for a grant formerly held at Cristobal de Tapia, in which he names certain boundaries and prays that real possession may be given him of this tract. On November 16, 1716, it was presented to Governor Martinez, who on that day makes "to the petitioner the grant that he asks for, as he describes it and as Cristobal de Tapia formerly enjoyed it." What the terms or conditions were upon which Tapia

formerly enjoyed it do not appear. It is evident, however, that the title Tapia held was not an absolute one, but a forfeitable one; otherwise there would have been no right in the governor to grant the land to Gutierrez. Thus, whatever the form of this Tapia grant, it is certain that Gutierrez at most received no more title than Tapia had, which was at best a defeasible and forfeitable title.

Further, there is no certificate of act of possession indorsed on the grant. There is a provision in the granting order that Capt. Baltazar Romero shall, after giving the possession, return the grant and possession to the governor's secretary. It was the custom that the officer executing the act of possession indorse on the grant document the formal certificate of his having done so. The original archive consists of a sheet of four pages, and the petition and order thereon occupies only two and a half pages, the remaining page and a half being blank. The fact that there is no act of possession entered thereon or found therewith indicates either that the governor, for some reason after receiving the petition and making the granting order, never delivered it to Gutierrez, but retained it in the archives; or that when handed Captain Romero, so that he might give possession, he found it impracticable to do so for some reason and returned the document to the archives.

Much importance was attached to this delivery of juridical possession by Spanish authorities. (1 White, 341, et seq.)

The necessity for delivery of possession in order to give a grant validity was emphasized in 1750 by Governor Thomas Velez Cachupin, as shown by archive

769 in the office of the surveyor-general of New Mexico. From the proceeding set forth in that archive it appears that certain heirs of Don Alfonso Rael de Aguilar in 1750 presented their petition to Governor Cachupin, setting forth that a grant was made to them by Governor De Vargas in 1696, and requesting that their right thereto be recognized. Governor Cachupin thereupon directed them to present their title papers. They thereupon produced a certified copy thereof which showed, as in this case, a petition and a grant, but no act of possession. Governor Cachupin thereupon declared the instrument to be a "nullity," giving as a reason for this conclusion, among others, the fact that "*the possession and the settlement of the plain of Los Cerrillos do not appear in the same.*"

This proceeding is most instructive as a contemporaneous construction by the chief official of the province of the necessity for juridical possession. A translation of so much of the archive as is relevant is attached to this brief as an appendix.

The fact that Gutierrez, as shown by deed of January 7, 1734 (archive 178 R., p. 16), conveyed all of this land to Padilla, does not prove that Gutierrez had full title to the property by possession conferred, but simply that he deeded Padilla such title as he had.

Nor is there any sufficient proof of the north boundary of the Antonio Gutierrez grant. This boundary is stated to be "an arroyo with some cottonwood trees." There is no proof as to the location of this, either as a matter of fact or of tradition. Indeed, claimants' petition (R.,

2) admits that this is a fact, but alleges that this defect is obviated by the fact that this tract is bounded on the north by the Joaquin Sedillo property and that these two tracts were united in ownership at an early date. The indefiniteness surrounding the Sedillo claim is hereinafter pointed out, and if the Gutierrez grant must depend for its location upon the *situs* of the Sedillo tract or grant, it is believed that this court will have no alternative but to reject this branch of the claim for vagueness and uncertainty as to the northern boundary.

### B.

The only evidence of a grant to Joaquin Sedillo offered on the trial was deed dated January 11, 1734, from Antonio Sedillo, legitimate son and forced heir of Joaquin Sedillo, wherein (archive 178, R., 18) he conveys to Diego Borrego, for \$200, a tract of land "acquired by his said father *in part by grant in the name of His Majesty* and in part acquired and held under real sale, as shown by five instruments which he delivered."

The conclusion of the court that this was a grant to Joaquin Sedillo thus rests solely upon the recital in the deed between these private parties.

1. This, it is contended, is insufficient to establish a grant.

To hold that it is sufficient is to hold that a declaration made by the party in interest that he has a grant from the Government is to be taken as evidence of that fact, although the Government was no party to the document and in no sense interested therein. That such recitals are not evidence against persons not parties to the

instrument or claiming in privity therewith is a proposition of law that hardly needs authority to sustain it.

The following are, however, a few of the numerous cases sustaining this position:

*United States v. Hughes*, 13 How., 6.

*Fuentes v. United States*, 22 How., 443.

*Simmons Creek Company v. Doran*, 142 U.S., 437.

Probably no better statement of this contention could be made than to quote from a decision of the Court of Private Land Claims in another case, for the confirmation of what was known as the Sebastian de Vargas grant, wherein it was sought to establish a grant by recitals in other grants and also by recitals in private deeds. This opinion forms a portion of the transcript in case No. 74, October term, 1897, on the dockets of this court, wherein the appeal was, on October 27, 1897, dismissed under the tenth rule. The court below in this case, by a bare majority, confirmed a portion of the tract therein claimed so far as it was referred to in adjacent grants, but rejected the portion a grant of which was sought to be established by the recitals of deeds tendered in evidence. The opinion of the court, delivered by Mr. Justice Sluss, the same learned judge who rendered the opinion of the court in this case, contains the following:

It is contended that these two deeds, being more than thirty years old, are within the category of "ancient deeds," and that their recitals are competent evidence and are sufficient to establish the existence of the grant to de Vargas and the facts of the conveyance from de Vargas to de Sena.

There is no rule of law conferring particular sanctity or probative force upon the recitals on a

deed which happens to be thirty years old. Such recitals are simply statements of the party who made the deed. The deed is simply evidence that he made the statement. The statement is entitled to no more weight by reason of being written in a deed than it would have if the making it was satisfactorily proven beyond testimony. Recitals in deeds are binding on those who make them and on those who claim under them. But such recitals are not even evidence against those who claim adversely or by title paramount to the deed. The facts of this case illustrate the absurdity of any other rule. \* \* \*

2. Such a recital, viewed as a statement by Antonio Sedillo that his father had a grant, is, under the most favorable construction, but secondary evidence of the existence of such a grant. The best evidence is manifestly the grant itself, produced from the archives, or the *testimonio* thereof, which was always given to the grantee, produced from the custody of his successors in interest. Neither of these were produced and no attempt was made to account for their absence. Hence no foundation was laid for the use of this recital as evidence of a grant.

3. But, conceding that a recital of this kind establishes that a "grant" was made to Joaquin Sedillo, the question remains, What kind of a grant was it?

The Court of Private Land Claims is a court of limited jurisdiction.

*Ainsa v. United States*, 161 U. S., 222-223.

*Cessna v. United States*, 169 U. S., 187.

*Hayes v. United States*, 170 U. S., 637-647.

Before parties can secure a confirmation at its hands, they must bring themselves by their proof within its

jurisdiction. Until they do this the court is powerless to act. It seems proper, therefore, to call attention to a few of the provisions of statute under which, and only under which, the court below is permitted by law to proceed.

Under section 6 of the act of March 3, 1891, parties are required to set forth in their petition—and since they must allege it they must prove it—“the *date and form* of the concession, warrant, or order of survey.”

In this case no attempt was made to allege or to prove the *date* of the grant, if there was a grant, so as to enable the court to determine whether it was made at a time when the local authorities of New Mexico or other authorities short of the Crown could make a grant. No attempt was made to allege or to prove its *form*, so as to enable the court to decide whether it conveyed the fee or something short of the fee. *Non constat* but that it was a mere license to occupy, or a mere permit to pasture, such as was held by this court in *Zia v. United States* (168 U. S., 198) to be not entitled to confirmation under the act of 1891. The definition of the word “grant” as given in the case of *Strother v. Lucas* (12 Pet., 436) is broad enough to have included either of these. *Non constat*, further, but that it was a grant made upon conditions proof of performance of which “within the time and manner stated in the concession” is made by subsection 8 of section 13 of the act of 1891 a prerequisite to a confirmation.

Section 6 of the act of March 3, 1891, further provides that claimants of grants must set forth the authority “by whom made,” or, as it is more forcibly stated in sub-

section 1 of section 13 of the land court act, "no claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the Government of Spain or Mexico."

However, as to this "grant" it is not alleged nor proved "by whom it was made;" *non constat* but that it was made "in the name of His Majesty" by an alcalde or by some other of the subordinate officials, who so frequently and without authority assumed the power to alienate the public domain in New Mexico under the Spanish Government. As held by this court in construing this very language of the act in the case of *Hayes v. United States* (170 U. S., 647):

By the first subdivision of the thirteenth section of the act creating the court of Private Land Claims, that court and this court on appeal are expressly prohibited from allowing any claim under the act "that shall not appear to be upon a title lawfully and regularly derived from the Government of Spain or Mexico, or from any other of the States of the Republic of Mexico having lawful authority to make grants of land." This manifest limitation upon the power of the court in passing upon the validity of an alleged complete grant requires that the court shall not adjudge in favor of validity unless satisfied from the inherent evidence contained in the grant, or otherwise, of an essential prerequisite to validity, viz, the authority of the granting officer or body to convey the public domain.

In the same case this court, after comparing the act of 1891 with other acts, says:

But in the act of 1891 the court is required to be satisfied not simply as to the regularity *in form*, but

it is made essential before a grant can be held legally valid that it must appear that the title was "lawfully and regularly *derived*," which imports that the court must be satisfied, from all the evidence, that the official body or person assuming to grant was vested with authority, or that the exercise of power, if unwarranted, was subsequently lawfully ratified.

Under the act of 1891 it is further provided (section 6) that no decree shall be entered otherwise than upon full legal proof and hearing. Measured by the requirements of the statute, it must be admitted that the proofs fall very far short of what is necessary to secure a confirmation. Even if the declaration of Antonio Sedillo, that his father had a grant, be accepted as evidence against the United States, such a declaration is not in the slightest degree inconsistent with the theory that the title held by Joaquin Sedillo was not in fee simple and was not "lawfully and regularly derived" from the Government of Spain.

In the Jose Garcia Case, a grant claim decided by the Court of Private Land Claims since that here appealed from, the subject here discussed has been considered very fully. In that case the recitals of a grant to the predecessors in interest of claimants were not in private deeds, but in grant documents, in one or two instances over the signature of the governor of the province itself. The recital of a grant to Garcia was made in these not once, but in three separate and solemn instruments signed by the *alter ego* of the Crown himself; and yet the Court of Private Land Claims held upon these facts that the claim could not, under the wording of the act of 1891, be sustained. A copy of the opinion in that case, which is

entitled *Mariano S. Otero v. United States*, No. 92, is attached to this brief as a part hereof. It can hardly be doubted that had the present case been considered by the court below, with the light it had before it in the consideration of the Jose Garcia grant, the judgment herein rendered would have been a very different one.

4. Even if the evidence be adjudged sufficient to establish a grant to Joaquin Sedillo, and such a grant as the Court of Private Land Claims is invested with jurisdiction to confirm, there is no proof of what the boundaries of that grant are. The provisions of the act of March 3, 1891, require allegations and proof of boundaries of the grant claimed. In fact, the decision of these questions is one of the most important duties confided to the court, involving an investigation by the court on the trial of the claim (section 7 of the act of 1891) and another inquiry, when the survey of the grant, if confirmed, comes back to the court for consideration (section 10 of the act of 1891). In this case, however, there is no proof of such boundaries. The only documentary evidence tendered on this subject is the recital of the deed of January 11, 1734, above referred to. In that instrument the boundaries of the tract sold by the heirs of Joaquin Sedillo to Diego Borrego are stated to be: "On the north, the line of the league of the Isleta Pueblo; on the east, the Rio Grande; on the south, a twin *alamo* called by some *culebra*, and on the west, the ridge of the Puerco."

Were these the boundaries of the grant, the proof would still fail, for there is nothing to indicate the location of the south boundary, and, in fact, claimants, in

their petition in the Sedillo Case (R., 1), admit that the location of that boundary can not be identified with certainty, and that probably no tradition of its location now exists. However, the boundaries just recited are not the boundaries of a grant to Sedillo, but of what is called a grant *plus* five purchases. The language referring to the boundaries just recited is: "The said tract was acquired by his said father in part by grant in the name of His Majesty, and in part acquired and held *under real sale*, as shown by *five instruments* which he delivered." How much of this land was held by grant? How much was held by purchase under these five conveyances? What were the boundaries of the portion held by grant? Was said granted portion in the northern part of the tract, next to the Indian pueblo lands, or in the southern portion, toward the Gutierrez lands? Was it on the east, next to the Rio Grande, or on the west, next to the hills of the Puerco? Since the Court of Private Land Claims can confirm only *grants* and grants "lawfully and regularly derived," it was incumbent on claimants to separate the land held under grant from that under purchase, so as to enable the court to declare in its decree what the boundaries of the grant were. To ask the court to confirm a tract with the above boundaries as a grant to Joaquin Sedillo is to ask the court not only to adjudge that as to which there is no proof, but to decide something which is negated by the proof. To declare that Joaquin Sedillo had a grant with the boundaries recited in the deed of January 11, 1734, is to ignore the language of that deed, which

specifically states that a portion of said lands was held by purchase and not by grant.

The defects in the documentary evidence on this point are not remedied by any oral proof showing tradition as to the boundaries of the grants claimed. In response to a question from counsel for the Government (R., p. 10) Colonel Chavez, the principal claimant, admitted that his only knowledge of the location of the two grants claimed was derived from the title papers presented and from an argument of counsel for the Government at a former term. This last reference is to the trial of the Ana de Manzanares, or San Clemente grant case, the title papers and the decree in which are in the record, introduced by claimants (R., 32-35), and in which case the archives relied upon by the claimants herein were offered in evidence by the United States and discussed by counsel for the Government as bearing upon the location of the north boundary of the San Clemente grant. It is not going out very far beyond the record to say that claimants herein had no knowledge of the existence of the archives upon which they now rely until long after the San Clemente claim was presented, and that they made no claim under these archives as muniments of title until after the decision in the San Clemente case had established that their claim was not a part of that grant. The San Clemente claim, as shown by the record, was decided September 4, 1896, and the claims herein sued for were filed September 9, 1896.

Claimants appear by their pleading to attempt to remedy the defects in the proof as to their south bound-

ary, and as to the boundaries generally, by the allegation that the Sedillo grant is immediately adjacent to the Gutierrez grant, and that the two, conterminous with each other, at an early date became a single tract, extending from the pueblo lands on the north to the San Clemente lands on the south. This contention is doubtless based upon the recital in the deed dated January 7, 1734 (R., 16), wherein Diego Padilla, in conveying the north part of lands acquired by him by donation from *Antonio Gutierrez*, described said lands as bounded on the north by the *lands of Joaquin Sedillo*. However, the lands of Sedillo, as described in deed, dated only four days later, from his heirs to Borrego (R., 18) are, as above shown, defined as consisting of lands acquired by grant and "under real sale," which brings us back to the unknown quantity above referred to, to wit, what part of this tract was by grant and what part by real sale? Until this last question is answered the court is powerless to proceed, that is, unless the act of 1891 is to be held to confer power on the court to confirm not only claims based upon "grants, concessions, warrants, or orders of survey" (section 6 of the act of 1891), but also those based upon purchase from private individuals and upon possession from time out of mind. This brings us to the next proposition in connection with this grant to Sedillo.

5. There can be no confirmation of this claim as a title by prescription.

There was proof on the trial of the cause that the portion of the two grants therein claimed lying east of the

present bed of the Río Grande, said portion being known as the Bosque de los Pinos, had been occupied by the predecessors in interest of the claimant J. Francisco Chaves since the early part of the century under conveyances from the heirs of one Clemente Gutierrez, who, as appears from archive 371 (R., 19), was in possession of the premises at the time of his death in 1785. It was admitted by the United States, so far as the portion of these two grants lying west of the present bed of the Río Grande is concerned, that the Indians of Isleta had notoriously occupied lands therein as far back as memory can extend, under conveyances from the heirs of Clemente Gutierrez. It was not admitted by the United States that this occupancy extended to all the tract west of the Río Grande, and the only conveyance in evidence to said Indians, a paper dated 1808 (Plaintiffs' Exhibit G, R., 27), fails to show the east and west boundaries of the tract purchased by them. Hence, the state of this branch of the record is simply to show that the Indians of Isleta have been occupying pieces of land, the boundaries of which are not given, on the west side of the present bed of the Río Grande, between their patented lands and the lands of Los Lentes or San Clemente, from time out of mind.

Does this state of facts justify the Court of Private Land Claims in decreeing a confirmation to said parties as a matter of prescription?

It does not seem necessary for the purpose of the present case to go at length into the question as to whether title by prescription would run against the Spanish Crown. The principle of *nullum tempus* is one universal to all

nations, and is firmly engrafted upon our own system of government.

*Lindsey v. Miller*, 6 Pet., 672.

*Weber v. Harbor Commissioners*, 18 Wall., 70.

*Sparks v. Pierce*, 115 U. S., 408.

*Gibson v. Chouteau*, 13 Wall., 99.

*Redfield v. Parks*, 132 U. S., 239.

The reason of the principle is very clearly stated in the case of *Lindsey v. Miller* (9 Pet., 672), where it is said:

It is a well-settled principle that the statute of limitations does not run against the State. If a contrary rule were sanctioned, it would only be necessary for intruders upon the public lands to maintain their possessions until the statutes of limitations shall run, and then they would become invested with the title against the Government and all persons claiming under it. In this way the public domain would soon be appropriated by adventurers. Indeed, it could be entirely impracticable, by the use of any power within the reach of the Government, to prevent this result. It is only necessary, therefore, to state the case in order to show the wisdom and propriety of the rule that the statute never operates against the Government.

If this principle is so closely guarded under our system of government, where the instrumentalities of government and the facilities for travel are so efficient to discover and to prevent any appropriation of public land to private use, how much more is its existence to be presumed in the case of a monarchy, with all its royal prerogatives and its sovereign attributes. This is especially true when it is reflected that the sovereign in this instance

was across the seas and his domain included vast and inaccessible territory, whose adverse occupancy by adventurers would not in all probability be brought either to his royal notice or even to the notice of his agents in the ultramarine provinces. Certainly, the reason of the principle as applicable to the Spanish provinces is so apparent as to make an assertion of its nonexistence a matter of skepticism, or at least of most careful scrutiny.

This subject is one which has engaged the attention of the courts of this country a number of times, and it is believed that any lack of harmony in the decisions as to the prescriptibility of public lands finds at least a partial explanation in the fact that most of these cases involve controversies as to the right of possession between individuals and in which deeds or grants have been presumed in aid of a long possession. The difference in principle between this class of cases and that in which the sovereign contends with subject asserting his title paramount to the soil is quite obvious.

Perhaps the most recent and thorough work on this subject is that entitled "Legislation and Jurisprudence on Public Lands," by Wistano Luis Orozco, esq., of the Guadalajara, Mexico, bar, published in 1895. This publication has been quoted from by this court in several recent cases, notably in the *Santa Fe Case* (165 U. S., 710), and quotations therefrom have also been made in a number of briefs filed in this court in cases appealed from the Court of Private Land Claims, among them the case of *Ely's administrator v. United States*, reported in 171 U. S., 220.

In the supplemental brief for the Government in that case appear the following extracts from Mr. Orozco's work, which are reproduced as quite pertinent here:

The Crown of Spain, and afterwards the Mexican Government, always claimed and disposed of these overplus lands.

The first Spanish law we find on overplus lands is Law XIV, Title XII, Book IV, of the Compilation of the Indies, of Philip II, of November 20, 1578, March 8, 1589, and November 1, 1591, as follows:

"Inasmuch as we have fully succeeded to the seigniorship of the Indies, and inasmuch as the vacant lands, soils and grounds that have not been granted by the Kings, our predecessors, or by Us, or in our name, belong to our royal patrimony and crown, it is necessary that all the land that is held without just and true titles, be restored to us, according and as it belongs to Us, so that, reserving, before all things, what should appear to Us, or to the viceroys, audiences and governors, to be necessary for parks, town commons, municipal domains, pastures and vacant lands for the places and councils that are populated, as well as with regard to what concerns the future and the increase they may have, and allotting to the Indians what they may have need for farming and for making their plantations and for stock-raising, confirming them in what they now have and giving them again what is necessary, all other land may remain and be free and unburdened to grant and dispose thereof at our will. For all of which we order and command the viceroys and presidents of the pre-torian audiences, to set, when it shall appear to them convenient, a proper term for the possessors to exhibit before them and the ministers of their audiences, whom they shall appoint, the titles of lands, stock-

farms, Indian farms, and *caballerias*, and, after protecting those who hold under good titles and instruments or just prescription, the rest be returned and restored to Us, to dispose thereof at Our will."

Mr. Orozco, after quoting this law, Vol. II, page 1007, says:

"And Law XVII of the same book and title expressly declares that the public lands are a part of the royal exchequer. The same declaration is found in Chapter XIII of the royal instruction of October 15, 1754.

"Relying on the test transcribed, we can set down the principle:

*"The public lands in the Republic of Mexico are imprescriptible."*

In his Volume II, Title III, pp. 993, et seq., entitled "Prescription," the learned author very thoroughly discusses the general propositions of prescription, including a full consideration of the two legal phrases very often argued against the views here urged, and in fact relied upon in the majority opinion of the court in this case. One of these phrases, the term "a just prescription," is found in the last part of Law XIV, Title XII, Book IV, of the Compilation of the Indies, and the other, referring to "a just title by prescription," is found in chapter 4 of the Royal Instructions of October 15, 1754.

Mr. Orozco, upon a full discussion of these expressions, demonstrates (article 2) that they have no application to a case such as is presented by this record, and that even if these had force they were repealed by the provisions of Law IX, Title VIII of Book II, of the Novísima Recopilacion, which provides that the royal lands and other

property (*bienes*) belonging to the royal treasury are absolutely imprescriptible and orders that the prescription can not be acquired even by time immemorial, which by the same law shall be considered interrupted and annulled. The Novísima Recopilacion having been approved and ordered observed as the law of the Spanish dominion by King Charles IV in a cedula dated July 15, 1805 (Orozco, vol. 2, title 3, article 2), this was a declaration which interrupted the running of prescription from that date, if it even ran before against the Crown (*Weber v. Harbor Commissioners*, 18 Wall., 57, 71). As the continuous possession relied on by the court in its opinion (R., 39) originated from the time of Clemente Gutierrez in 1785, and the only proof of possession that can under a most favorable view be deduced from the record had thus run only twenty years prior to this cedula arresting any such possession as a basis for prescription, this claim under the proofs at that date lacked many years of the forty years which the court below holds to be the basis for prescription against the Crown.

But whether prescription did or did not run against the Crown, it is confidently submitted that a title resting on prescription is not such a claim as the Court of Private Land Claims has jurisdiction to confirm.

An even casual examination of the act of 1891 will show that its provisions do not confide to the Court of Private Land Claims the duty of confirming claims resting upon mere possession. Some of those provisions have been discussed above in connection with the proposition of proving grants by mere recitals in a deed. The views urged in that connection apply with even more

force to a claim based upon naked possession and the presumption of a grant following therefrom. Thus the provision of section 6 that "any person \* \* \* claiming lands within the limits of the territory derived by the United States from the Republic of Mexico \* \* \* by virtue of any such Spanish or Mexican grant, concession, warrant, or survey as the United States are bound to recognize and confirm," may present his claim, is utterly inconsistent with the theory that anything but a written muniment of title can constitute the foundation of a suit in the Court of Private Land Claims.

In *Lafayette et al. v. Blanc* (3 La. Ann., 59) the language construed was identically the same contained in this act, being "the title to lands claimed by virtue of incomplete French or Spanish 'grants, concessions, warrants, or orders of survey,'" and this was held by the court not to confirm any claim unsupported by written evidence of title emanating from the French or Spanish Governments. (See also *State v. Cardinas*, 47 Tex., 250.)

The act of 1891 is, in its description of the class of titles which it covers, very similar to the act of May 26, 1824 (4 Stat. L., 52), the wording of the latter being "by virtue of any French or Spanish grant, concession, warrant, or order of survey legally made, granted, or issued by the proper authorities." In cases arising under that act, as reenacted by the law of July 17, 1844 (5 Stat. L., 676), it was held that there was "no power to act upon evidence of mere naked possession, unaccompanied by written evidence, conferring or professing to confer, a title of some description."

*United States v. Powers' Heirs*, 11 How., 569.

*United States v. Rillieux's Heirs*, 14 How., 188.

The further provisions of the act of 1891 are still more conclusive of the proposition that the court can not proceed upon *mere* naked possession. Thus, section 6 further requires the petition to state the *date* and *form* of the grant, possession, warrant, or order of survey.

The act of 1824, above referred to, contained a like provision, and its purpose is discussed in *Moore's Case* (12 How., 216), where it is said that this is required "in order that it may be seen whether the officer making the concession or sale had power to do so at the time it was done." But, if grants may be confirmed on allegations and proof of mere possession, this provision of statute becomes nugatory and senseless, as thus the further provision of section 6, which requires that the petition state "by whom" the grant is made.

Further, under section 8, the section under which this claim is filed, permission to invoke the jurisdiction of the court is extended only to those holding under a *title* derived from the Spanish or Mexican Government. This *title* must be one "lawfully and regularly derived" from one of the governments just mentioned (subsection 1 of section 13), and not only that, but it must be made to "appear" that it is so derived. (*Hayes v. United States*, 170 U. S., 637.) It must further be made to "appear" that every condition and requirement, either antecedent or subsequent, contained in the original grant has been performed in the time and manner stated in such grant. All these provisions of the act of 1891 show that it was not intended to include claims resting upon mere possession; and the provisions of the statute

are equally exclusive of grants resting upon naked possession, whether such possession shall have extended back a half dozen years or a century before the treaty.

If there were any doubt upon this proposition it is, however, dispelled by the fact that Congress in the act of 1891 has not only withheld from the Court of Private Land Claims the power to recognize anything short of a paper title, but has actually confided to another department of the Government the power, under certain restrictions, to recognize and provide for possessory claims. Thus under section 16 of the act as amended by the act of February 23, 1893 (27, Stat. 47), provision is made for the protection of anyone who has "through himself, his ancestors, grantors, or their legal successors in title or possession, been in the continuous, adverse, actual, bona fide possession" of land for twenty years next preceding the time of survey of the township wherein situate. Under this section, upon making proper proof, such possessors of land may receive a patent therefor to an extent not to exceed 160 acres. A similar provision is made in section 17 of the act, as amended by the act of February 23, 1893, above referred to, for persons claiming title in townships already surveyed, who had been in "actual, continuous, adverse possession" of lands for twenty years next preceding such survey.

These two sections measure the degree of recognition which Congress is thus far willing to accord to claims resting upon mere possession, although such possession may have been sustained for years under the former government. To secure more liberal recognition parties must either present to the Court of Private Land Claims

"a grant, concession, warrant, or order of survey" lawfully and regularly derived from the Government of Spain or Mexico, with which they can connect themselves, or, if unable to do this, they must appeal to the legislative department of the Government.

## II.

*Even if there were a grant to one or both of these parties, claimants herein have not connected themselves therewith, so as to give the court jurisdiction of their claim.*

That claimants have not connected themselves with either the alleged grant to Gutierrez or that to Sedillo, is discussed in the statement of the case above. From this it will be seen that the last mention of the Antonio Gutierrez title is in 1736, when as shown by archive 178, the northern portion of his claim was owned by Nicolas de Chaves, and the remainder by Diego Padilla. The last mention of Joaquin Sedillo's claim is also in 1736, when his property was owned by Nicolas de Chaves. When we next hear of this property it is nearly fifty years later, in 1785, when a portion of the land embraced in these two claims is mentioned as part of the assets of the estate of Clemente Gutierrez. Claimants herein de-rain title regularly from Clemente Gutierrez. There is nothing to fill in the gap of fifty years in the title, or to show how Clemente Gutierrez acquired this property. The court below seems to have proceeded on the theory that Clemente Gutierrez acquired the interest he held by inheritance from Antonio Gutierrez, basing this conclusion on the identity of names. There are several very serious obstacles to this proposition. One of them is the

fact that the name Gutierrez is one of the commonest in the territory of New Mexico, and to presume that Clemente Gutierrez was a lineal descendant of Antonio Gutierrez, because both were named Gutierrez, affords about as reliable a conclusion as that John Smith is a lineal descendant of William Smith because they both enjoy the possession of the great American cognomen. Another obstacle to the conclusion suggested by the court is the fact that claimants disclaim any ability to "present a conveyance from the original grantee or from his heirs, with which they are in any way connected." (R., 2.) If Clemente was an heir of Antonio, certainly the claimants, of all persons, ought to know it; and as they do not claim this to be a fact, the court below went quite a long distance in yielding to them a conclusion which they expressly disclaimed. A further and conclusive objection to deraignment of title by a presumption of heirship to Clemente Gutierrez from Antonio Gutierrez lies in the fact that, as shown above, the lands of Antonio Gutierrez did not, when last heard from, belong to him at all, but to Diego Padilla; so that even were Clemente his heir he would still not have inherited a foot of the property. Further, any speculative relationship between the two Gutierrezes hardly explains how the latter one acquired the lands of Joaquin Sedillo, which, when last heard from (in 1736), were claimed by Nicolas de Chavez. This alleged consecutiveness of title or possession from Gutierrez to Gutierrez, or even from Nicolas de Chavez and Diego Padilla to Clemente Gutierrez, is negatived by the very name applied to the eastern portion of this tract, "Bosque de los Pinos." This, as

pointed out in the statement of the case *supra*, means the "cottonwood grove of the Pinos," and indicates that the tract at one time belonged to or was held by some persons bearing the very common New Mexico name of Pino. The attempt to deraign title by inheritance must thus be abandoned, and any connection established must rest upon the presumption of deeds from the owners of the land in 1736, such that Clemente Gutierrez owned the property in 1785.

Whatever may ordinarily be the rule as to presuming deeds in chains of title in suits between individuals, it is respectfully submitted that that doctrine can have no application in a proceeding such as the present, where the Government submits to a suit against it upon explicit terms. One of the terms upon which suitors come into the Court of Private Land Claims is that hereinbefore discussed, by which it is provided that "no claim shall be allowed that shall not *appear* to be upon a title *lawfully and regularly derived* from the Government of Spain or Mexico." This provision is evidently intended to require that claimants shall not only show that the title they hold is one that lawfully originated with the Government of Spain or Mexico, but that it was regularly derived by them from one of those Governments. In other words, the question of whether, after establishing that a grant was made covering the premises, claimants hold under that grant is a matter not of conjecture but of proof. Otherwise all that a claimant has to do in order to get a confirmation covering thousands of acres is to find in the archives a paper title made to parties two hundred years ago, prove that he has been for a long time in possession

of a few acres of such a tract, and thereupon it becomes the duty of the court to confirm the whole grant. In the archives at Santa Fe there are a large number of this class of papers, and if all that a claimant has to do to take the title of the whole tract out of the Government is to prove possession of a part thereof, without connecting himself with the grant, or indeed proving that he claims under the grant, there will be little left of the public domain in New Mexico after the Court of Private Land Claims finishes its labors.

It is this very proposition that was met by the California tribunals in passing upon grants under the act of 1851. Thus in *McMicken's Case* (97 U. S., 208) this court says :

The petitioner claims as devisee of Charles McMicken under his will bearing date in 1855, which is set out in full in the record. An inspection of this will shows that the tract in question was not named in it nor devised in any way. \* \* \* As the appellant does not pretend to have any other title than that of devisee under this will, it is difficult to see how his petition can be sustained. If this were an action of ejectment, there could be no question on the subject. But it is contended on the part of the petitioner that, whether his own title be properly deraigned or not, the court, satisfied of the validity of McMicken's title, might make a decree in favor of his legal representatives, for the benefit of whom it might concern. A decree in this form is often made against the Government in these land cases when a title is satisfactorily established and the parties prosecuting it connect themselves in some way with it so as to show some real interest to be protected. (*Castro v. Hendricks*, 23 How., 438 ;

*Brown v. Brackett*, 21 Wall., 387.) But a mere stranger to the title can hardly ask the court to go to that length. It is not for everyone who chooses to take up the prosecution of such claims without any connection whatever with the title sought to be established.

In the case at bar the facts are as consistent with the theory that Clemente Gutierrez held under possessory title as that he held under conveyance from the parties who claimed the property in the year 1736. At that time the country was overrun by Indians. Cristobal de Tapia had lost his title to the very same premises by abandonment or for some other equally conclusive reason, and it is thoroughly within probabilities to suppose that the owners of 1736 had done likewise. At any rate, in 1785 the heirs of Clemente Gutierrez do not assert that their father had title from the owners of 1736; but simply (R., 20) that "they have possession," or, as the Spanish more accurately translated is, "of which possession is held," and the same inventory says that "*there is no title deed (documento) of its boundaries.*"

It was to cover this very contingency, among others, of inability to prove mesne conveyances (which under *Castro v. Hendricks*, 23 Howard, 442, must be produced to enable the board to determine if there is a bona fide claim before it under a Mexican grant) that led Congress to provide that such parties might, under sections 16 and 17 of the act of 1891, although lacking their titles, still retain their homes and ancestral possessions by proving possession of not less than twenty years "by themselves, their ancestors, grantors, or their lawful successors in

*title or possession.*" It is to this department of the act that claimants herein must look for their remedy. Under this the several Indians of the pueblo of Isleta who have been occupying patches of ground on the west side of the Rio Grande for years may secure patent in severalty by virtue of their privileges as citizens (*United States v. Joseph*, 94 U. S., 614), and likewise Colonel Chavez may secure patent for his Bosque de los Pinos. This recourse is still available to them, since the time for filing under the small-holdings portion of the act of 1891 was extended by act of Congress approved June 27, 1898, to March 4, 1901. If the 160 acres allowed under this act is deemed by Colonel Chavez insufficient to satisfy such equities as he considers he is possessed of, his redress must come from Congress, not from the Court of Private Land Claims.

### III.

*Even if the proof be adjudged sufficient to establish a grant to Antonio Gutierrez and to Joaquin Sedillo, either or both, and even if the claimants herein be held to have connected themselves with such grants, the title conferred thereby was not complete and perfect at the date when the United States acquired sovereignty over the Territory of New Mexico; and the claims herein presented are therefore barred by the provisions of section 12 of the act of March 3, 1891.*

Section 12 just referred to provides that all claims mentioned in the section 6 (i. e., those which were not at the date of the treaty complete and perfect) "shall, at the end of two years from the taking effect of this act, if no

petition in respect to the same shall have then been filed, as hereinbefore provided, be deemed and taken, in all courts and elsewhere, to be abandoned and shall be forever barred."

Section 8, which provides for the filing of claims for complete and perfect grants, does not contain this limitation. It may, however, be very seriously questioned whether this limitation does not apply to all claims presented to the Court of Private Land Claims. Otherwise parties alleging a perfect grant may file their petitions in court praying a confirmation on the very day the life of the court expires by limitation. While it is not, under section 8, incumbent on claimants of perfect grants to come into court, if they elect to come in they must do so within some reasonable time, and the whole machinery created by the act of 1891 indicates that the period contemplated is two years from March 3, 1891. If this contention be well founded, this claim, whether perfect or imperfect, was presented too late, having been filed on September 9, 1896.

But even if a perfect grant could be sued for after the two years' limitation imposed by section 12, it is respectfully submitted that this claim is barred, for the reason that it is not shown by the proof to be founded upon a perfect and complete title.

The imperfections of the Antonio Gutierrez grant paper have been already discussed, including the matter of juridical possession, the presence of which has been uniformly held essential to a perfect title. (*More v. Steinback*, 127 U. S., 70; *Graham v. United States*, 4 Wall., 259; *Van Reynegan v. Bolton*, 95 U. S., 33.) Likewise

as to the Joaquin Sedillo claim, the lack of proof has been considered at length. It is not intended to repeat that discussion under this heading, but simply to call the court's attention to the fact that even if claimants have established to either of these parties, such grant is imperfect and incomplete, for the reason that it is not shown to have been confirmed as required by the cedula of October 15, 1754. (Reynolds, p. 50.) As was said by the court below in its opinion on the Cañon de San Diego grant, made in 1788 (*Chaves v. United States*, 168 U. S. 177):

The law of Spain at the time this concession was made required that the land should be actually occupied by the grantees, and should be cultivated for the period of four years, as conditions of obtaining the legal title to the property. It was also required that proof should be made to the audiencia of the district of the fact of compliance with this law, and that the grant should be confirmed by the audiencia before the title could pass from the crown. The evidence before the court contains no hint that the Garcias cultivated any part of the tract for the required period, or that any proof of such cultivation had been made, or that the grant had been confirmed by any officer or body having authority in such matters. On the contrary, the evidence in the case tends to show that up to 1808 the grant had not been confirmed. Where a petitioner asserts that a title under which he claims land in this court is a complete and perfect one, we think the burden is upon him to show affirmatively the happening of those matters which are necessary prerequisites to the existence of a complete and perfect title.

A perfect title is one which does not require a further exercise of the granting power to pass the fee in the land. It is a title which conveys full and absolute dominion, not only as against all private persons, but as against the Government, and which may consequently not be disallowed by the political or granting power, and stands in no need of reaffirmance from such power.

*Stevenson v. Burnett*, 35 Cal., 432.

*Doe v. Estara et al.*, 9 How., 445.

Argument of Mr. Call, counsel for the United States, in the Clarke Case, 8 Peters, 705, et seq.

The policy of the Spanish Government requiring two authorities to concur before the fee vested and the title became "perfect and complete" dated from a very early period.

Thus, by law 16, title 12, book 4, Law of the Indies, promulgated June 16, 1617, before definite title to the public lands passed against the Crown, the acts of the colonial officers were to receive royal confirmation (2 White, p. 53; Hall's Mexican Law, sec. 26).

Under the royal ordinance of November 24, 1735, it was necessary for those who received grants to apply to the King himself for the confirmation of the same "under penalty of losing them if they should not do so." (Reynolds, p. 50.)

The expense and inconvenience of securing approvals and confirmations from the Crown was so great, especially to those living beyond the seas, as to lead to the institution of a more convenient method of obtaining definitive titles by Spanish subjects to whom concessions had been made. This was provided in the royal cedula

of October 15, 1754 (Reynolds, p. 50), wherein the evils connected with the former system are set forth and provision is made for the future alienation of Crown lands. Thus under that cedula the viceroy and presidents of the royal audiences were empowered to appoint subdelegates with authority to make sales and compositions of Crown lands in New Spain, and the subdelegates in their turn were also authorized to appoint deputies in distant provinces. It was further provided that the subdelegates should forward the original proceedings had by them on land locations to the audiences for approval, and when approved by the audiences the subdelegates issued the titles, which were then sent to the audiences for confirmation. In section 12 (Reynolds, p. 55) it is provided that "in provinces remote from the audiences or where the sea is between \* \* \* confirmations shall be made by their governors, with the approval of the royal officers and acting attorney-general where there is one."

This system was subsequently displaced by that provided in the Ordinance of Intendants, dated December 4, 1786 (Reynolds, p. 59), which provided that officers of the Crown, called intendants, were empowered to make sales and compositions of the Crown lands in their several provinces. The original proceedings had by them were (article 81) to be forwarded to the superior board of the treasury for approval. The intendants issued the titles upon such approval, and the titles were again forwarded to the board for confirmation.

By the royal cedula of March 23, 1798 (Reynolds, p. 65), it was provided, upon considerations of economy and convenience similar to those recited in the cedula of

1754, that the transmittal of the final titles to the supreme board of the treasury for confirmation should be dispensed with upon the payment of 2 per cent of the price; but this provision did not dispense with the transmittal of the original proceedings had by the intendants, as required by article 81 of the ordinance above referred to.

A similar provision appears in the royal order of February 14, 1805 (Reynolds, pp. 68, 73).

These royal decrees, some of which were observed as in force up to the very date of the Mexican independence, have been considered in cases decided under the Louisiana and Florida acts and the construction uniformly given by this court in such cases has been that concessions unapproved by the proper authority constituted, not a perfect title, but an incomplete and imperfect title, depending, since the treaty for its completion, upon the action of the political authorities of the United States.

Thus the case of the *United States v. Arredondo* (6 Peters, 691) recognizes the difference between perfect and imperfect grants under the Spanish régime, in the following language (p. 717):

The whole legislation of Congress from 1803 to 1828 in relation to the three classes of cases, so far as respected Spanish titles, is of a uniform character in cases of corresponding description. The rules vary according to the kind of title set up. Distinctions have been made in all the laws between perfect or complete grants, fully executed, or *inchoate, incomplete ones, where a right had been in its inception under or by color of local law or authority, but required some act of the Government to be done to complete it.*

The case of *Menard's heirs v. Massey* (8 How., 293) was one involving a grant made on November 8, 1799, by the lieutenant-governor of Louisiana, but not approved by the intendant-general of the province. The court in discussing the dignity of the grant document presented says (p. 303):

That the lieutenant-governor of Upper Louisiana had the authority, as a subdelegate, under the intendant-general of the provinces of Upper and Lower Louisiana and Florida, to make concessions is undeniable. He could and did deal with the public domain of the province, made concessions, directed the land to be surveyed, and caused grantees to be put in possession. This, however, does not settle the question. It does not depend upon the existence of power, or want of power, in the lieutenant-governor, but on the force and effect of the right his concession conferred. Did it give such a vested title in the soil, as the Spanish Government could not legally disavow it? Or could the intendant-general, representing the royal authority, lawfully refuse to confirm the concession and order the grantee to be turned out of possession? If it be true that the title ended with the concession, survey, and occupancy of the land granted, then it follows that the title was completed and perfected under the Spanish laws by these acts; nor was a confirmation from any higher power than the lieutenant-governor at all necessary, the grantee having all the title that the King could give.

The court after considering the question of whether the approval of the intendant-general was necessary, in the course of which article 81 of the Laws of Intendants,

above referred to, is discussed, arrives at the following conclusion (p. 306):

The necessity of a further title than a mere loose order of survey, given by commandants of posts and lieutenant-governors and placed in the hands of the interested party, is too manifest for comment. Petitions were written by the party asking the land, or someone for him. The governor consented, usually by indorsement on the petition, and ordered that the petitioner should have the land and directed that it should be surveyed. The paper was handed to the petitioner, who might deliver it to the surveyor or omit it. If he presented it and the land was laid off, then it was the surveyor's duty to record both the concession and plat, together with the *procès verbal*. But this did not make the party owner; without the further act of the King's deputy—intendant-general—the title still continued in the Crown.

See also *Glenn v. United States*, 13 How., 250.

The titles to Gutierrez and to Sedillo, if ever issued, never having been returned to or approved by the governor "with the approval of the royal officers and acting attorney-general" (section 12 of cedula of 1754, Reynolds, p. 55) or by any of the other officers subsequently provided for by whom titles might be confirmed, were not at the date of the treaty "perfect and complete" so as to be cognizable under section 8 of the act of 1891.

The court below evidently was of opinion that the confirmation of this grant might be presumed from lapse of time. In so doing it evidently overlooked the fact that an essential ingredient of prescription, even against individuals, is "good faith and just title." A neglect of

a requirement of law, however, no matter for how long a time, could not constitute "good faith" so as to lay the foundation for a prescription curing such neglect.

As was said in *Deffenback v. Hawke* (115 U. S., 392, 407):

There can be no color of title in an occupant who does not hold under any instrument, proceeding, or law purporting to transfer to him the title or to give him the right of possession. And there can be no such thing as good faith in an adverse holding where the party knows that he has no title and that, *under the law*, which he is presumed to know, he can acquire none by his occupation.

The application of this doctrine to titles lacking confirmation under the cedula of 1754 is fully discussed by Mr. Orozco in his book above quoted from. In this discussion he says:

It may be asked if a title which lacks confirmation and annotation is sufficient to establish the right of prescription against the national treasury, that defective document serving as a just title.

He then goes on to answer this query in the negative in the language quoted by Mr. Justice Murray in his dissenting opinion in this case (R., p. 43, 44).

He concludes as follows:

As the requisite of "confirmation" was commanded by the law, ignorance that such requisite was necessary can not be alleged, inasmuch as ignorance of the laws of the country benefits nobody.

This is simply another way of putting the principle referred to by this court in *Hayes v. United States* (170 U. S., 651), that *juris error* is never a good foundation for prescription.

## IV.

*The form of the decree of confirmation by which the land lying east of the Rio Grande is confirmed to J. Francisco Chaves and that lying west of the present bed of the Rio Grande is confirmed to the Indians of Isleta is not justified by the record or by the act of 1891.*

The fact that the record does not show Colonel Chaves to own all the land confirmed to him, or the Indians to own all the land confirmed to them, would seem sufficient to sustain the position just announced.

Granting that Clemente Gutierrez owned all of the Bosque de los Pinos in 1785, at his death the property went to his widow, Maria Apolonia Baca, who received one-half, and to his five children, Lorenzo Gutierrez, Lorenza Gutierrez, wife of Francisco Antonio Garcia, Maria Manuela de la Soledad Gutierrez, wife of Mariano de la Peña, Maria Luisa Gutierrez, and Juana Gutierrez, who each received one-tenth (archive 371, R., 20). By plaintiffs' Exhibit D the interest of Manuela de la Soledad Gutierrez—one-tenth—seems to have passed to the grandfather of Colonel Chaves. By Exhibit E the interest of Maria Luisa Gutierrez—another tenth—seems to have been similarly conveyed. By Exhibit F the interests of Lorenzo and Lorenza Gutierrez—each one-tenth—seem to have also passed, making in all a four-tenth's interest vested in the ancestor of Colonel Chaves. No conveyance appears of record from the widow of Clemente Gutierrez, who owned a half interest, or from Juana Gutierrez, the remaining child, who held a tenth. So, also, as to the Indians of Isleta, who (Exhibit G,

R., 27) were deeded lands on the west side of the Rio Grande by the administrator of the estate of the widow of Clemente Gutierrez. Assuming that the administrator had a right to sell land, he certainly could sell only the interest of his intestate, so that, as the children of Clemente Gutierrez did not join with their mother's administrator in this conveyance, the Indians became thereby the owner of only an undivided half interest. Further, their deed does not recite any west boundary, so that the finding that they are the owners to the *ceja* (ridge) of the Rio Puerco, which is some miles west of the Rio Grande, is unsupported by proof. The Court of Private Land Claims thus decreed that patent to the east part of this land should go to J. Francisco Chaves, when he showed on the trial title to only four-tenths of that portion, and that title to the west part should go to the Indians, although they showed at best only a half interest in a tract without east and west boundaries (Exhibit G, p. 27). Such a finding can hardly be sustained. If so, it is difficult to determine what is to become of the holders of the other interests belonging to the Gutierrez family. It certainly can not be that they are to be shut out by a decree giving the patent to the whole to the holders of only a half, and yet that is the effect of this decree.

It was to provide against just such a contingency as this that subsection 5 of section 13 of the act of 1891 was inserted, reading as follows:

No proceeding, decree, or act under this act shall conclude or affect the private rights of persons as between each other, all of which rights shall be preserved and saved to the same effect as if this act had

not been passed; but the proceedings, decrees, and acts herein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands.

If the claimants herein had shown even an absolute and complete chain of title to the whole tract from the Crown of Spain, it would still have been the duty of the court under this provision to have confirmed the grant, not to the claimants appearing before it, but to the "assigns and legal representatives of the original grantee." This would leave the door open for other parties at interest to come into the local courts and show their interests under the confirmation, and even to question the conveyances by which the claimants in the Court of Private Land Claims sought to assert title to the whole or a part of the tract. To make a decree in any other form is to "conclude and affect the private rights of persons as between each other," and this the statute prohibits. The form of decree just referred to as the proper one is, it may be stated, the form followed by the court below in every other confirmation it has entered since its organization.

The fact that it pursued a different course in the present instance must be accounted for on the theory that it concluded that a decree of confirmation herein to the "assigns and legal representatives" of the original grantees would be a mere moot decision, since there was no one before it deraining title from such grantees, and thus no one who would be benefited by such a decision.

This consideration demonstrates anew the proposition hereinbefore urged that there should be no confirmation

in this case, for the reason that neither of the claimants connect themselves with the alleged grantees.

In conclusion of this brief it seems proper to add that the Government does not deny that the claim herein presented is possessed of some equities; and were the court below one of general equitable jurisdiction, unhampered by statute and vested with plenary power to recognize all demands upon the equitable consideration of the Government, there might be a confirmation for at least a part of this not inconsiderable claim of twenty-five or thirty thousand acres. To confirm upon these petitions, however, this court must first presume a grant, must thereupon presume a confirmation of that grant so as to make it a perfect title, and finally must presume a regular derangement of interest therefrom. In the language of of this court in the case of *Bergere v. United States* (168 U. S., 75), "this requires an entirely too free use of presumptions."

It is respectfully urged that the decision of the Court of Private Land Claims should be reversed and claimants relegated to the tribunal provided by sections 16 and 17 of the act of 1891, where they belong.

Respectfully submitted.

JOHN K. RICHARDS,

*Solicitor-General.*

MATTHEW G. REYNOLDS,

*Special Assistant to the Attorney-General.*

WILLIAM H. POPE,

*Special Assistant to the Attorney-General.*

**TRANSLATION OF ARCHIVE 769.**

**YEAR OF 1750. PETITION OF THE HEIRS OF DON ALFONSO  
RAEL DE AGUILAR THAT THEY BE GIVEN POSSESSION  
OF AN OLD GRANT OF LANDS.**

*To the Governor and Captain-General:*

The heirs of Major Don Alfonso Rael de Aguilar being Eusebio Rael de Aguilar, Juan Rael de Aguilar, Antonia Teresa Rael de Aguilar, Francisca Rael de Aguilar, and the children of the deceased Alfonso Rael de Aguilar, and the children of Feliciano Rael de Aguilar, now deceased, all, and in their name, the four brothers and sisters now living, at the feet of your excellency say: That by the death of our deceased father we were left with a grant of lands which he acquired by grant which in the name of His Majesty was made to him by the Marquis Don Diego de Vargas, who was Governor of this Kingdom, its conqueror, and our deceased father being one of the conquerors who were in this Kingdom at the time of the conquest; with due formality we present before your excellency the grant, which is the place of Los Cerrillos, with its pastures, waters, woods, and watering places as they were settled by our deceased father; that in the year of ninety-six a portion of this Kingdom having rebelled, by order of the governor our deceased father left the said Cerrillos, where he lived four years, and built houses which can be proved to-day, since their ruins remain; and it is a matter of fact that he did not leave us any other piece of land other than the said Los Cerrillos, and (it is also a matter of fact) that within the last years they have been used for the pasturage of the horses of this royal garrison, to which we all say, let them graze there and welcome for all the time which may be necessary

and none of us will object except in regard to the cultivated lands—that there is room for all; and we ask your excellency to bear it very much in mind that we are very loyal vassals of His Majesty, and legitimate children of one of the conquerors, and that Juan Rael de Aguilar, one of the heirs, is to-day in this city and that he has his family in Chihuahua because he has not in this Kingdom a piece of land, and so soon as your excellency may be pleased to grant us the said land, he will bring his family to this Kingdom, for all of which:

We ask and pray that your excellency will grant that which we ask, which is what we expect of the justice of your excellency, and we pray and swear in due form that this our petition is not in bad faith and in that which is necessary, etc.

JU. RAEL DE AGUILAR. [RUBRIC.]

FELIPE TAFOYA, [RUBRIC.]

*Procurador.*

\* \* \* \* \*

SANTA FE, *April 25, 1750.*

Let these parties present the titles and grants which they mention.

VELEZ. [RUBRIC.]

*To the Governor and Captain-General:*

The ensign Don Alfonso Rael de Aguilar, a soldier and civil and military secretary of this kingdom of New Mexico by appointment of your excellency, before whom I appear and state that in view of the fact that this kingdom of New Mexico is already subjugated and conquered, it having cost your excellency much vigilance, care, and treasure, I register a tract called Los Cerrillos, which is from four to five leagues from this town of Santa Fe, of which in the name of His Majesty will your excellency make me a grant as one of the conquering soldiers who

have come with your excellency; which tract I ask for with its entrances and exits, usages and customs, with waters, pastures, and watering places, just as it was held by the former settlers thereof.

I ask and pray, with proper humility, that your excellency will be pleased to concede and make me grant of said tract, in the name of His Majesty, on account of my being a poor married man with children, and expect of your excellency that you will grant me what I have asked for; and I swear with due legal formality that this my petition and registry is not in bad faith, and whatever is necessary, etc.

ALFONSO RAEI DE AGUILAR.

At this military garrison and said place of the town of Santa Fe, kingdom of New Mexico, on the eighteenth day of the month of September, of the year one thousand six hundred and ninety-two, before me, Don Diego de Vargas Zapata Lujan Ponce de Leon, governor and captain-general of this said kingdom and its lands and provinces for His Majesty and castellan of his forces and garrisons, it was presented by the party therein named, who is a soldier at this garrison, and my civil and military secretary, and in view of his services and the loyalty with which he has served, and the love he has shown toward His Majesty, I, said governor and captain-general, make to him, in the name of His Majesty, grant of the lands, with their pastures, waters, woods and watering places, usages and customs, and whatever pertains thereto, in order that he may enjoy it according to his will, for himself and his heirs, by the will of God our Lord and that of the King our lord, in whose royal name, and in view of his merits and services, I make to him the said grant. And in witness thereof I signed it with two witnesses, who were the captain and ensign of this garrison, and I returned to him this said petition and the decree of grant therein contained in the presence of

Major Don Fernando de Chaves and Captain Antonio Jorge, citizens of this said kingdom and assistants who have served in said conquest.

DON DIEGO DE VARGAS ZAPATA LUJAN PONCE  
DE LEON.

ROQUE MADRID.

JUAN DE DIOS LUCERO DE GODOY.

It agrees with its original, to which I refer, from which I, General Don Juan Paez Hurtado, deputy governor and captain-general, caused it to be transcribed literally, upon the petition of the party, on account of the original grant being very much damaged. It is certain and true, corrected and amended; and there were present as instrumental witnesses, and to see it copied, Sebastian de Apodaca, Domingo Valdez, and Lucas Moya, all citizens of this said town, I acting as special justice, with my attending witnesses, for lack of a public and royal notary, of which there is none in this kingdom, on the present paper, because of there being none of any stamp in these regions. I certify.

[Signed] JUAN PAEZ HURTADO. [RUBRIC.]

Witness:

[Signed] DIEGO DE UGARTE. [RUBRIC.]

Witness:

[Signed] MANUEL TENORIO DE ALBA. [RUBRIC.]

SANTA FE, April 27, 1750.

Having examined the petition of these parties and the certified copy of the grant which they present, I, Don Tomas Velez Cachupin, governor and captain-general of New Mexico and castellan of its royal garrison, in view of the nullity of the instrument, because the possession and the settlement of the plain of Los Cerrillos do not appear in the same, nor the power of Don Juan Paiz Hurtado to give a certified copy of the grant purporting

to be original, and that so many of the governors, my predecessors, have not permitted the said places to be settled nor held (possessed) by any citizens, because of their being commons for the pasturage and support of the many horses of this royal garrison, and it being the place nearest to it for dispatching at the shortest notice any expedition needed for the royal service and defense of these dominions, I ought to order, I, the said governor, that that which these parties ask shall not be entertained nor permitted, of which the alcalde mayor of this city will notify them and will ask for the old original grant, which with this memorial and decree he will return to my possession; and I thus provided, ordered, and signed, acting with my assisting witnesses, to which I certify.

TOMAS VELEZ CACHUPIN. [RUBRIC.]

Witness:

JUAN ANTO GONZS. DEL PERAL. [RUBRIC.]

Witness:

THOMAS DE ALVEAR Y COLLADO. [RUBRIC.]

In the United States Court of Private Land Claims,  
Santa Fe, N. Mex. June term, 1898.

MARIANO S. OTERO	}	No. 92. Jose Garcia Grant.
v.		
UNITED STATES.		

On July 5, 1898, the court delivered the following opinion by Fuller, A. J.:

In this case the court decided at the May term, 1897, that the plaintiff had established a perfect grant and was entitled to a confirmation of the land which was embraced in certain boundaries, in the opinion given. The plaintiff was dissatisfied with the boundaries and applied to the court for a rehearing, which was granted. At this term the case has been reheard fully. Since the delivery

of the opinion in this case, the Supreme Court has decided the case referred to by Mr. Justice Murray in the opinion he has just delivered, of *Martin B. Hayes v. The United States*, for the Antonio Chavez grant, in which the court put a construction on the clauses of the act constituting this court, therein referred to as being different from the Florida act and the California act; it is therein declared to be the duty of this court to be satisfied that the granting authority was an authority that had proper power to grant. Now, in this case the plaintiff asks for the confirmation of a grant which he alleges was made some time prior to the year 1762. No more definite date is fixed than that. The language is that "a grant was made some time prior to 1762." The grant is alleged to have been made, juridical possession given, recorded, and the record is lost, and the grant is lost; an effort is now made to set it up as a lost grant. The only documentary evidence adduced is that there are three, or perhaps four, other grants lying contiguously, which call for the boundaries of the Jose Garcia grant; and that of the Jose Garcia grant of lands there is as much evidence of possession common to the public at large as he and his successors had for grazing purposes, and that is all the evidence that is adduced. There is no evidence showing or tending to show the character of the grant—whether it was a grant absolute, as alleged, or whether it was a grant upon conditions, and, if so, whether these conditions were performed, or whether the grant was for the mere purpose of pasturage. As to the character of the grant there is no evidence at all. We are therefore unable, according to the rules prescribed by the decisions of the Supreme Court of the United States, to find that the plaintiff has made good the allegations of his petition. His grant is therefore rejected and his petition is dismissed.

THOMAS C. FULLER,  
A. J., C. P. L. Claims.

